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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 108

ANDREW J. CHRISTOPHER, THIRD NATIONAL BANK & TRUST CO., AS EXECUTOR OF THE ESTATE OF GEORGE W. WEIMER, DECEASED, ET AL.,

Petitioners,

vs.

W. E. BRUSSELBACK AND W. I. BELL, STEPHEN D. FORST, ET AL., ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR PETITIONERS.

ROY G. FITZGERALD,
WELLMORE B. TURNER,
ROBERT E. COWDEN,
HOWARD P. WILLIAMSON,
Counsel for Petitioners.

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W. E. BRUSSELBACK AND W. I. BELL, STEPHEN D. FORST, ET AL., ETC.

BRIEF FOR PETITIONERS.

I.

Opinions of the Courts Below.

The District Court for the Southern District of Ohio, Western Division, did not deliver an opinion. The judgment entered in that Court appears at page 61 of the Record of this case.

The opinion of the Circuit Court of Appeals for the Sixth Circuit, to which an appeal was taken, was delivered on December 15, 1936, and is reported in 87 F. (2d) 761. It appears on page 74 of the Record.

II.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 939, 28 U. S. C. A. § 347.

The decree of the Circuit Court of Appeals for the Sixth Circuit was entered December 15, 1936 (R. 73). A petition for rehearing was filed January 12, 1937, within the time provided by the rules of said Circuit Court of Appeals (R. 79). The petition for rehearing was denied March 9, 1937 (R. 79). A petition for writ of certiorari to said Circuit Court of Appeals was filed in this Court on June 2, 1937, within the time provided therefor. The petition was granted by this Court on October 11, 1937.

III.

Statement of the Case.

Respondents, as creditors of The Chicago Joint Stock Land Bank, filed a bill in equity in Ohio to collect the double liability assessment against the shareholders of that bank.

The respondents' bill of complaint recites (R. 4) that in October, 1932, a class suit in equity to establish the double liability of the shareholders of The Chicago Joint Stock Land Bank was instituted in the United States District Court for the Northern District of Illinois, at Chicago; that in that bill there were named as defendants The Chicago Joint Stock Land Bank and all of its shareholders, exceeding one thousand in number; that service was had on all shareholders residing in Illinois who could be found; that no service was attempted upon non-resident shareholders, and none of the Ohio shareholders was served, appeared, or defended.

The bill further alleges that the matter was referred to a master, and that his report, which was adopted by the

Court, found that the bank was insolvent to the extent of approximately twelve million dollars ($12,000,000) and recommended that an assessment of one hundred per cent (100%) should be levied against all shareholders (R. 5); that this levy was made by the Chicago decree (R. 28), dated August 5, 1935.

Subsequently, on August 8, 1935, respondents instituted this present action in the District Court in the Southern District of Ohio against all shareholders resident in Ohio to collect the assessments theretofore determined and levied in the Chicago decree. Their bill of complaint further alleges (R. 5) that said Chicago decree is effective and binding on all the shareholders of the Bank, wherever residing, and whether of record or otherwise, and that it effectively adjudicates against the defendants named in such bill of complaint that all of the shareholders of the Bank are liable to the creditors of the Bank for an assessment equal to one hundred per cent (100%) of the par value of the shares held by them.

No allegation as to the insolvency of the Bank or the necessity of making an assessment against its shareholders was contained in the bill, nor was the Bank made a party, in Ohio.

Petitioners filed a large number of motions to dismiss upon various grounds which may be classified for the purpose of convenience into three principal issues:

1. The bill of complaint, as amended, does not state facts sufficient to constitute a good cause of action in equity; and

2. The bill of complaint, as amended, does not state facts sufficient to constitute a good cause of action, either at law or in equity; and

3. The bill of complaint does not state facts sufficient to show the required jurisdictional amount of in excess of three thousand dollars ($3,000.00).

The District Court dismissed the bill of complaint (R. 61) on the following grounds:

1. That said bill, as amended, is insufficient to constitute a valid cause of action in equity;

2. That the matter in controversy does not exceed, exclusive of costs and interest, the sum or value of three thousand dollars ($3,000.00); and

3. Upon the grounds raised by all other motions.

Thereafter, the complainants, failing to amend their bill of complaint and treating the decree of the District Court as final, appealed to the Circuit Court of Appeals for the Sixth Circuit (R. 61, *et seq.*). That court reversed the decree of said District Court and remanded the case to said District Court (R. 73). It is this decree of reversal which is now before this Court for review.

IV.

Specification of Errors.

The Circuit Court of Appeals erred in refusing to affirm the decree of the District Court dismissing the bill of complaint, on the grounds that:

1. The bill of complaint, as amended, does not state facts sufficient to constitute a good cause of action, either legal or equitable, because the bill does not allege insolvency of the Bank or necessity for the assessment.

2. The bill of complaint, as amended, does not state facts sufficient to constitute a good cause of action, either legal or equitable, against those defendants who are representatives of estates of deceased shareholders, for the reason that said bill does not allege the presentation of the claims for the assessment to such representatives, as required by the General Code of Ohio.

3. The bill of complaint, as amended, does not state facts sufficient to constitute a good cause of action in equity for the following reasons:

a. This is a secondary suit to collect a one hundred per cent (100%) assessment heretofore made by the decree of the Chicago court, for which the remedy at law is full and adequate.

b. There is no trust fund involved.

c. This is not a true class suit.

d. A class suit is unnecessary in this case.

e. Multiplicity of suits is not alone sufficient basis for equity jurisdiction, and never by plaintiffs.

4. The bill of complaint, as amended, does not state facts sufficient to show the required jurisdictional amount of in excess of three thousand dollars ($3,000.00), for the following reasons:

a. Andrew J. Christopher owns but seven (7) shares of stock and many of the defendants own less than thirty-one (31) shares, alleged by complainants to have a par value of one hundred dollars ($100.00).

b. The defendants who own more than thirty (30) shares of stock each cannot be sued *in this action* for more than their proportionate liability *to these complainants*, which in every instance is less than Three Thousand Dollars ($3,000.00), even when calculated on the basis of a par value of one hundred dollars ($100.00) per share.

5. The bill of complaint, as amended, exhibits on its face a misjoinder of defendants, and a misjoinder of causes of action.

6. The bill of complaint, as amended, exhibits on its face a defect of parties plaintiff.

V.

ARGUMENT.

Point A.

The Circuit Court of Appeals should have affirmed the decree of the District Court dismissing the bill of complaint, on the grounds that the bill did not state facts sufficient to constitute a good cause of action, in that it failed to allege the facts necessary to establish the insolvency of the Bank and the necessity for the assessment, and relied merely upon the decree of the District Court in Chicago as to those elements.

It is the position of counsel for petitioners that the bill of complaint in this case does not state facts sufficient to constitute a good cause of action in that it fails to allege the facts necessary to establish the insolvency of the Bank and the necessity for the assessment. The bill relies upon the decree of the District Court in Chicago as establishing those elements. Following is the allegation upon which the respondents rely (R. 5):

> "10. Plaintiffs are advised, and therefore allege, that the above mentioned decree of the United States District Court for the Northern District of Illinois is effective and binding not only upon the Illinois stockholders who were served with process in such cause, but is equally effective and binding upon all of the stockholders of the Bank, wherever residing, and whether of record or otherwise, insofar as such decree determines and fixes the necessity and extent of the assessments for which the stockholders of such Bank are liable. So it is that such decree effectively adjudicates against the defendants herein that all of the stockholders of the Bank are liable to the creditors of the Bank for an assessment equal to one hundred per cent of the par value of the shares held by them, respectively."

The bill contains no allegation as to the insolvency of the Bank, the extent of any such insolvency, the necessity for assessment of statutory double liability on the Bank stock, or the amount of such assessment.

In support of our contention that such allegations are essential and that respondents are not entitled to rely upon the decree of the Chicago court as establishing those elements which support the assessment sought to be collected in this suit, we call the Court's attention first to the case of *Holmberg et al.* v. *Carr*, 86 F. (2d) 727, decided by the Circuit Court of Appeals for the Second Circuit on December 7, 1936. In that case it was held that an assessment levied by a United States District Court in Minnesota on the shareholders of a Minnesota joint stock land bank is without extraterritorial effect, requiring dismissal of a bill filed by creditors in a Federal court in New York against New York shareholders, where the bill does not allege the facts underlying the liability for the assessment. At page 729, the court said:

> "The bill at bar, as drafted, depends altogether upon what was done in the district court of Minnesota; it does not allege the facts upon which the liability depends, but only their adjudication by that court; hence it can depend only upon the conclusiveness of the assessment there found."

As to the conclusiveness of that assessment, the court said, at page 730:

> "Therefore we hold that the assessment in the district court has no extraterritorial effect, and that the bill should have been dismissed."

In their brief in opposition to our petition for writ of certiorari, the respondents cite the case of *Brusselback et al.* v. *Cago Corporation et al.*, 85 F. (2d) 20, in support of the sufficiency of their bill of complaint in the instant

case. This was a case brought in the District Court in New York City by Brusselback and others (the same complainants in the instant case) to collect from New York shareholders the same assessment sought to be collected in the present case from Ohio shareholders. Respondents assert that the cases are identical, and would have us believe that the bills of complaint were substantially the same. It is quite true that in both bills of complaint it was alleged that the decree of the Chicago court is binding on non-resident shareholders and effectively adjudicates against them the liability for the assessment. But there is in fact a vital difference between the two bills of complaint, in that the bill in the *Cago* case contains in addition the allegations as to the facts underlying the liability for the assessment, which we claim were improperly omitted from the bill in the instant case. Paragraph 26 of the bill in the *Cago* case reads as follows:

> "26. The debts and liabilities of said Chicago Joint Stock Land Bank exceed its assets in the amount of approximately Twelve Million Dollars ($12,000,000.00) and the defendants therefore are justly indebted to and there is due and owing from each of the defendants to the creditors of the Chicago Joint Stock Land Bank, including the complainants, an amount equal to the full par value of the stock owned by each of the defendants as aforesaid, which amount appears opposite the names of said defendants in Exhibit 'A'."

No similar allegation is contained in the bill of complaint in the case at bar, and it is this omission to allege these facts underlying the liability for the assessment which makes the bill fatally defective. That this important difference in the pleadings was recognized and considered by the Second Circuit Court of Appeals, is clearly shown by the following quotation from the opinion in the *Carr* case, *supra:*

> "Therefore we hold that the assessment in the district court of Minnesota has no extraterritorial effect

and that the bill should have been dismissed. The plaintiffs may have leave to plead over, if they wish; it is not perfectly clear what they meant in the following allegation of the first article of the bill regarding the Minnesota bill: 'the allegations of which bill of complaint are hereby repeated and adopted as though the same were fully incorporated and set forth herein.' Whether this was intended to allege a straight cause of action against the shareholders under Brusselback *v.* Cago Corp., *supra,* independently of anything done in limine, or whether it was only scrivener's redundancy, we cannot tell; we give the pleading the benefit of the doubt. On the amendment, if any, all reference to the Minnesota suit should be omitted; and there will be no receiver appointed, ancillary or other."

Thus it clearly appears that the Second Circuit Court of Appeals recognized the necessity for the allegations as to the facts upon which the liability for the assessment must be based, and both the *Cago* and the *Carr* cases are authority for our contention that the bill in the case at bar is defective for want of these essential allegations.

Never having been served with process in the suit in the District Court in Chicago, the Ohio shareholders will be deprived of their right to defend the matters relating to the insolvency of the Bank and the amount of the assessment if the present bill of complaint is allowed to stand. The position of these shareholders is clearly stated by the Court in its opinion in the *Carr* case, at page 729:

"Here, however, we are concerned with a federal statute, which not only gives no express power to any official to levy an assessment, but which (Wheeler *v.* Greene, *supra,*) seems to us to interpret as requiring the assessment to be made afresh in the suit against the shareholder. The language we refer to is on page 51 of 280 U. S., 50 S. Ct. 21, 74 L. Ed. 160. 'There is not the same need that the stockholder's liability should be summarily disposed of behind his back * * * rather

than by the usual proceeding of a bill in equity which is brought in the neighborhood, in which the stockholder can be heard, and by which the assessment instead of one hundred percent. can be adjusted to the specific case.' We should think that that applied as well to judicial assessments as to others."

When the *Cago* and *Carr* cases are tried on the merits, the New York shareholders will have the opportunity to defend the allegations as to the insolvency of the Bank and the amount of the assessment, while if the bill in the case at bar is permitted to stand, the Ohio shareholders will be foreclosed as to those elements, which were, in the words of Mr. Justice Holmes in *Wheeler* v. *Greene, supra*, summarily disposed of behind their backs.

There remains to be considered one further point with respect to the question of the extraterritorial effect of the decree of the Chicago court. In their brief in opposition to our petition for certiorari in this case, respondents stated that in support of the various motions to dismiss the bill in the District Court the defendants argued that the one hundred per cent (100%) assessment made in the Chicago suit was conclusive as to them and that suits to collect the assessment would have to be brought at law, and not in equity; and that having made such an argument below, petitioners are now estopped from asserting that the Chicago decree is without extraterritorial effect. No such argument was made by the defendants below in support of the motions to dismiss. The defendants simply contended, as they now contend here, that if the assessment previously made in the Chicago court is conclusive and binding on non-resident shareholders not served with process and not before the Chicago court, as alleged in the bill of complaint, such an assessment is collectible only by action at law. The motions to dismiss filed by various defendants have the same effect as demurrers, and the arguments in support thereof do not,

therefore, estop the defendants, as petitioners in this Court, in any respect.

POINT B.

The Circuit Court of Appeals should have affirmed the decree of the District Court dismissing the bill of complaint as to those defendants who represent estates of deceased shareholders, on the grounds that the bill did not state facts sufficient to constitute a good cause of action, in that it failed to allege presentation of the claims to such representatives, as required by the statutes and decisions of the State of Ohio.

The bill of complaint names among the defendants twelve decedents (R. 1, 2; 12 to 18, incl.). These decedents were also named as defendants (but, of course, not served with process) in the primary suit by these same plaintiffs in the District Court in Chicago.

The amendment to the bill of complaint here alleges that these twelve defendants were dead (R. 13), and that they all died prior to the entry of the Chicago decree of August 5, 1935 (R. 12 to 18, incl.). It thus appears of record that all the decedent defendants named in this Ohio suit were deceased prior to the time of filing this bill.

The bill, as amended, fails to allege the presentation of claims based on the assessments to the representatives of the estates of the deceased shareholders, prior to suing on the claims, as required by Ohio General Code, Sections 10509-112, 10509-133, and 10509-134 (set out in the Appendix herein).

These Ohio statutes require creditors of an estate to present their claims first to the executor or administrator for allowance or rejection within four months after his appointment, whether due or not due; and if the claim is disputed or rejected, to file suit then against the executor or adminis-

trator within two months thereafter, or within two months after the claim becomes due, or be forever barred.

In *State ex rel. Fulton, Supt. of Banks* v. *Bremer, Adm.*, 130 Ohio St. 227, a claim for super-added liability on bank stock was presented by the state superintendent of banks to the administratrix of a deceased stockholder, and was rejected. The superintendent did not commence suit for recovery against the administratrix within the two months fixed by law. He was held to be forever barred, under Section 10509-33, Ohio General Code.

Construing these Ohio statutes in the recent case of *Beach, Rec'r* v. *Mizner, Ex'r*, 131 Ohio St. 481, the Supreme Court of Ohio held that a petition against the executor of an estate which did not allege a presentation of the claim to the executor as required in these statutes did not state facts sufficient to constitute a good cause of action. In its opinion the court states the question presented to it as follows, at page 483:

> "The defendant contends that the plaintiff's petition is demurrable because it does not allege that the claim was presented to him as executor within four months after his appointment, as provided by Section 10509-112, General Code (114 Ohio Laws, 320), and contains no allegation to the effect that the plaintiff obtained leave from the Probate Court to file his claim for allowance, as provided by Section 10509-134 (114 Ohio Laws, 320)."

The Supreme Court of Ohio decides the question thus presented as follows, at page 487:

> "Since the plaintiff failed to allege that his claim was presented within four months or later upon leave first obtained from the Probate Court, the judgment of the Court of Appeals (which sustained the demurrer) must be affirmed."

The same construction of these statutes was given by an Ohio Court of Appeals in the unreported case of *Holmberg*

et al. v. *Third National Bank & Trust Company, Executor, et al.* (motion to certify overruled by Ohio Supreme Court December 16, 1936), which was a suit brought at law against the executor of a deceased shareholder of the Southern Minnesota Joint Stock Land Bank to collect the assessment hereinbefore referred to in connection with *Holmberg et al.* v. *Carr*, 86 F. (2d) 727. The Ohio Court of Appeals said:

> "We do not believe that the District Court of Minnesota, by action designating a receiver to proceed to collect this liability on behalf of the creditors, can invest that receiver with rights under the Ohio law which the creditors for whom he acts did not already possess. In other words, the procedural steps, which the receiver must take in the Ohio courts, can be no less than those which are required of the same creditors whose interests he represents. In our judgment this claim should have been presented to the executor defendant for allowance before this action was instituted.
>
> "If then it is necessary to present such claim for allowance, we approach the next question. Is it necessary to allege in the petition on a claim against an estate that such claim has been presented to the executor for allowance? It is our view that such allegation is necessary and that a failure to so plead makes the petition bad on demurrer as not stating facts sufficient to constitute a cause of action."

That such matters as this are to be governed exclusively by the law of the State is conclusively shown by the recent decision of this Court in the case of *Pufahl, Rec'r*, v. *Estate of Parks*, — U. S. —, 81 L. Ed. 73, in which it was held that a demand by the receiver of an insolvent national bank against its stockholders for an assessment of statutory double liability, while based on a Federal statute, may be enforced only in conformity with the law of the forum governing the recovery of debts of like nature.

There is no reason why these creditors suing in equity to enforce a statutory liability should be exempted from the

conditions prescribed by Ohio law as conditions precedent to filing suit against personal representatives of Ohio shareholders; and it is perfectly clear under the Ohio authorities cited above that they have not so complied with those conditions.

In their brief in opposition to our petition for writ of certiorari, respondents quoted a part of the opinion in the case of *State ex rel. Fulton, Supt. of Banks* v. *Bremer, supra.* The part so quoted is clearly *dicta* and is not mentioned in the syllabus of the opinion, which in Ohio constitutes the law of the case. The *Beach* case, relied upon by petitioners, was decided after the *Bremer* case, and is directly in point.

POINT C.

The Circuit Court of Appeals should have affirmed the decree of the District Court dismissing the bill of complaint, on the grounds that the bill did not state facts sufficient to constitute a good cause of action in equity for the following reasons:

1. This is a secondary suit to collect a one hundred per cent (100%) assessment heretofore made by the decree of the Chicago court, for which the remedy at law is full and adequate.

It is the position of counsel for petitioners that the decree of the Chicago court has no extraterritorial effect, and is not binding upon these Ohio shareholders who were neither served with process in that suit, nor appeared or defended therein. Assuming, however, that such decree were effective and binding on these Ohio shareholders, it is clear that this action was not properly brought in equity. The complainants in this suit do not seek a determination of the insolvency of the Chicago Joint Stock Land Bank, nor do they seek to fix the liability of the shareholders of that Bank, nor to levy an assessment therefor. Their bill avers

that these matters have already been determined in the suit in the Chicago court, and that an assessment of one hundred per cent (100%) was levied upon all shareholders of the Bank.

Complainants' bill further avers that this decree in Chicago levying the assessment is binding upon the Ohio shareholders and that they cannot contest either the insolvency of the bank nor the amount of the assessment, nor the necessity therefor (R. 5). This suit in Ohio is merely one to collect the assessment heretofore assessed and levied by the Chicago decree.

In such an action to collect a shareholder's double liability assessment, theretofore fixed and levied, any remedy is at law. Such legal remedy is held to be adequate, full and complete, and equitable relief is uniformly denied.

Kennedy v. *Gibson,* 8 Wall. 498;
Casey v. *Galli,* 94 U. S. 673;
Mills v. *Scott,* 99 U. S. 25;
U. S. v. *Knox,* 102 U. S. 422;
Bushnell v. *Leland,* 164 U. S. 684, 685;
Lantry v. *Wallace,* 182 U. S. 546, at 548;
Studebaker v. *Perry,* 184 U. S. 258, 263, 264;
Hale v. *Allinson,* 188 U. S. 56, 78, to 81;
Kelley v. *Gill,* 245 U. S. 117;
Shriver v. *Woodbine Bank,* 286 U. S. 467, 478, 479;
Auer v. *Lombard* (C. C. A. 1), 72 Fed. 209;
Tompkins v. *Craig,* 93 Fed. 885;
Carey v. McMillan (C. C. A. 8), 289 Fed. 380;
Aufdenkamp v. *L'Herrison* (C. C. A. 9; 1932), 56 F. (2d) 344, 345;
Broderick v. *American General Corp.* (C. C. A. 4; 1934), 71 F. (2d) 864, 867.

The leading case for the proposition that the liability of the stockholder, where the complainant seeks the full amount of the liability, is at law, and not in equity, is

Kennedy v. *Gibson,* 8 Wall. 498.

This was an action commenced by the receiver of a national banking association appointed by the comptroller of the currency to recover the sum of $200,000, being the par value of the 2,000 shares of stock held by the defendants. The bill averred that it would be necessary for the payment of the liabilities of the bank to obtain from its stockholders an amount of money equal to the full amount of the stock so issued. It alleged that it was necessary to have an accounting and concluded with a prayer for an accounting and for a decree directing the defendants to pay their pro rata share of such balance of debts of the bank as might remain. The court, however, held, at page 505:

> "The liability of the stockholders is several and not joint. The limit of their liability is the par of the stock held by each one. *Where the whole amount is sought to be recovered the proceeding must be at law.* Where less is required the proceeding may be in equity, and in such case an interlocutory decree may be taken for contribution, and the case may stand over for the further action of the court—if such action should subsequently prove to be necessary—until the full amount of the liability is exhausted." (Italics ours.)

In *Casey* v. *Galli,* 94 U. S. 673, another action by the receiver of a national bank to enforce the liability of the defendant as a stockholder, the court, in disposing of the objection that the action was commenced at law and should have been begun in equity, said, at page 677:

> "In regard to the first three of these objections, it is sufficient to say that Kennedy *v.* Gibson is conclusive against them. It is there said that the amount to be paid rests in the judgment and discretion of the comp-

troller, that his determination cannot be controverted by the stockholders in suits against them; *and that, when the order is to collect the full amount of the par of the stock, the suit must be at law.*" (Italics ours.)

In *Hale* v. *Allinson,* 102 Fed. 790, affirmed 106 Fed. 258, affirmed 188 U. S. 56, the Circuit Court, whose opinion was adopted by the Circuit Court of Appeals, in discussing the right to maintain an action in equity, said, at page 794:

> "*Where the whole amount is sued for, there seems to be nothing further for equity to do.* No account needs to be taken, no ascertainment of liability is to be had. Nothing is to be done, except to enforce a separate individual contract for an undivided sum. *For such enforcement the legal remedy is adequate,* even if the standard be applied that 'it is not enough that there is a remedy at law. It must be plain and adequate, or in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.'" (Italics ours.)

In the recent case of *Carey* v. *McMillan,* 289 Fed. 380, 386, the Circuit Court of Appeals for the Eighth Circuit said:

> "Furthermore, where the full amount unpaid is sought, the suit must be at law."

In determining the question of whether this suit was properly brought in equity it is necessary to distinguish between double liability suits such as *Pollard* v. *Bailey,* 87 U. S. 520, and *Wheeler* v. *Greene,* 280 U. S. 49, 50 S. Ct. 71, 74 L. Ed. 160, on one hand, where the determination of the necessity for and the fixing and levying of the assessment are the principal matters involved, and such cases as *Casey* v. *Galli,* and *Hale* v. *Allinson, supra,* on the other hand, where the collection of the assessments, theretofore levied either by judicial or administrative authority, is sought.

In the former class of cases the suit is necessarily in equity because the flexible forms of relief in a suit in equity,

such as interventions, accounts, contributions and assessments, are essential elements. In the latter class of cases the action is to recover a fixed amount theretofore assessed against each shareholder and is necessarily at law because in actions solely for money judgment the legal relief is adequate and complete. The assessment involved in the present action provides a perfect example of this distinction and of the necessity for preserving the same. The original suit in the Chicago court was a primary suit against the bank and its shareholders to determine the insolvency of the bank, to fix the amount of the assessment and levy the same. The case at bar is a secondary suit solely to collect the assessment so made in the Chicago suit. In their brief in the Court below, respondents relied heavily upon the so-called *Conway* cases to support the jurisdiction of equity.

Conway v. *Owensboro Bank*, 165 Fed. 822;
Conway v. *Owensboro Bank*, 185 Fed. 950;
Alsop v. *Conway*, 188 Fed. 568;
Robertson v. *Conway*, 188 Fed. 579;
Alsop v. *Conway*, 223 U. S. 720 (certiorari denied).

These are all primary cases, and as such are clearly distinguishable from the case at bar. They are comparable to the *Chicago* case which, like the *Conway* cases, was an action to assess, collect and distribute the statutory liability.

The *Conway* cases, as the Sixth Circuit Court pointed out in 188 Fed. 568, at 576, are distinguishable from and not governed by *Hale* v. *Allinson*. The Circuit Court said:

> "We find nothing in Hale *v.* Allinson, 188 U. S. 56, 23 Sup. Ct. 244, 47 L. Ed. 380, opposed to the views we have expressed for there the suit was merely to *recover, by suit in Pennsylvania,* the liability of stockholders of a Minnesota corporation *whose affairs were being administered in a suit instituted in that state.* There was plainly no reason why separate suits should not have

been brought against each stockholder, *and at law.*" (Italics ours.)

The case at bar, likewise, is distinguished from the *Conway* cases.

In *Conway* v. *Owensboro Bank*, 165 Fed. 822, 826, Judge Evans observed:

> "So that, while we think the demurrers should all be overruled, we do not mean to say that upon proper application the court would not direct the liability of stockholders to be determined *and enforced by actions at law to be brought by its receiver. We do not pass upon that phase of the case now, because it has not been presented.* What we hold is that the 'double liability' constitutes a trust fund for creditors which it is competent for this court to administer in a suit in equity, and that in order to do this effectually, the fund would have to be brought into court. We further think that in its discretion the court might pursue either the course of enforcing the liability in this suit, or by directions to its receiver, cause him to sue each or any of the stockholders in separate actions in any court having jurisdiction of such actions. We think this indicates the proper practice, and that it is supported by the authorities. Terry *v.* Little, 101 U. S. 216 * * *." (Italics ours.)

Had the *Conway* cases solely involved collecting assessments theretofore made from non-resident stockholders residing outside of the originating court's jurisdiction by means of ancillary or supplementary actions in those other jurisdictions, then such subsequent actions would of necessity have been brought at law.

Judge Evans points out—and so did the Sixth Circuit in reviewing *Alsop* v. *Conway*, 188 Fed. 568—that that question was not preser ed on the record there, and that the court was not passing on that question.

The *Conway* cases, therefore, do not hold, as respondents contend they do, that a subsequent and independent action

to collect in a jurisdiction other than that administering the trust fund, must be in equity and not at law.

We submit that it is immaterial whether the assessments provided for in the Federal Farm Loan Act (12 U. S. C. A. 812) be made by a court of equity, as directed in *Wheeler* v. *Greene*, or whether they be made by an administrative officer of the Government, such as the comptroller of the currency under the National Banking Act, 12 U. S. C. A. 65, as in *Casey* v. *Galli*, 94 U. S. 673, or the superintendent of banks under the New York Banking Act, as in *Broderick* v. *American General Corporation* (C. C. A. 4), 71 F. (2d) 864, 867.

The important query is not how were the assessments made; but have the assessments been made?

Such assessment, once made in the manner provided by law (whether by an administrative officer or by a court of equity) is collectible, as any other fixed obligation, in an action at law.

In other words, the function of a court of equity in levying an assessment under the Federal Farm Loan Act, is to establish an equal and ratable assessment because the statute does not empower a receiver of the bank or an administrative officer of the Government to do so. This is fully illustrated by the decision in *Wheeler* v. *Greene*.

The United States District Court, sitting at Chicago, according to the express allegations of the complainants' bill, has made that equal and ratable assessment against the shareholders of the Chicago Joint Stock Land Bank, leaving nothing further to be done than to collect that assessment so levied from each individual shareholder by subsequent proceedings at law.

That the plaintiffs below gratuitously pray for equitable relief such as the appointment of a receiver in the Southern District of Ohio and for an adjudication of how the funds shall be divided among the plaintiffs, does not change the legal character of this litigation. There is no averment

in the bill which warrants such a prayer and the court under such circumstances will look to the main relief sought, namely, the recovery of a money judgment, in determining the nature of the action. Collateral and gratuitous averments of an equitable character will be disregarded.

The Supreme Court said in *Buzard* v. *Houston*, 119 U. S. at page 351:

> "The effect of the provision of the Judiciary Act, as often stated by this court, is that 'whenever a court of law is competent to take cognizance of a right and has power to proceed to a judgment which affords a plain, adequate and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law *because the defendant has a constitutional right to a trial by jury.*' (Citing cases.) In a very recent case, the court said: 'This enactment certainly means something; and if only declaratory of what was always the law, it must at least have been intended to emphasize the rule and to impress it upon the attention of the courts.' New York Guaranty Co. *v.* Memphis Water Co., 107 U. S. 205, 214." (Italics ours.)

This has always been, and is today, the law.

Wood v. *Philips*, 50 F. (2d) 714, at page 717, citing with approval the language of Mr. Justice Field in *Whitehead* v. *Shattuck*, 138 U. S. 146;

Broderick v. *American General Corporation et al.* (C. C. A. 4), 71 F. (2d) 864.

At page 870, in the case last cited, the court, after discussing the statute above mentioned and the Seventh Amendment to the Constitution said:

> "Whatever may be said in other jurisdictions as to the superior advantage of trying a number of actions at law as one suit in equity because some common question of law or fact is involved, there is little to be said in its favor in the federal courts where the presence of such common question may furnish ground for consideration, so that even at law only one trial of the

common question will be required. * * * *And where to the lack of substantial advantage is added the constitutional requirement of trial by jury in actions at law, the argument against equity jurisdiction, merely because there are a number of plaintiffs and defendants and a common question of law or fact, is conclusive.* It must be manifest that an action at law does not lose its character as such because another action at law exists in favor of the same plaintiff or against the same defendant; for the character of an action is determined by the question which it involves, not by the fact that other actions involve the same questions. *It would be absurd to say that a suit against one stockholder to enforce his statutory liability is at law with the right of jury trial guaranteed, but that, if by chance the persons with whom he is in no way connected are also liable, he may be sued with them in equity and a jury trial denied him.* The guarantees of the Constitution are substantial rights of the citizen which may not be thus *whistled away* for reasons of supposed convenience." (Italics ours.)

U. S. v. *Bitterroot Co.*, 220 U. S. 451, 472 (1905);
Aufdenkamp v. *L'Herrison* (C. C. A. 9); 56 F. (2d) 344, 346.

It follows that a bill in equity such as the respondents here seek to maintain is improper and was properly dismissed.

2. This is not a true class suit.

The adjudicated cases demonstrate that in order to maintain a class suit there must be a common fund. This element is not present in this case.

Bickford's, Inc., v. *Fed. Reserve Bank*, 5 Fed. Supp. 875;
Mountain Lbr. Co. v. *Davis* (C. C. A. 2), 11 F. (2d) 219, certiorari denied 271 U. S. 674;
Yeaton et al. v. *Lenox et al.*, 33 U. S. 123;
Hale v. *Allinson*, 188 U. S. 56, at 79-80;
Bouton v. *Van Buren*, 229 N. Y. 17.

The correct rule is well stated in 28 U. S. C. A., Sec. 721-723, page 143, note 283, as follows:

> "Suits brought by or against numerous defendants are of two types. In the first type which is that of the true class suit, it will be found that the subject matter of the suit is a fund or property over which the court can and does acquire an effective jurisdiction by the joining of some persons as plaintiffs or defendants who may be considered representative of all those who are interested in the same fund or property. * * * In the other types of cases, spurious class suits, the suit is not concerned with a fund or property at all but with a personal liability."

This is clearly an action to recover on the personal and several liabilities of the various defendant shareholders and, as such, is not a true class suit.

3. A class suit is unnecessary.

Full, adequate and complete relief is available on the law side of the court in a case of this type. In their brief in the lower court respondents contended that this action must necessarily be in equity "because class suits at law are unknown." This conclusion is based upon a false premise because, although class suits are unknown at law, it does not follow that this is a class suit which must be in equity.

In the first place the right and obligation created by the statute is several, and not joint, and the right to enforce the same is at law.

12 U. S. C. A., Section 812;
Richmond v. *Irons*, 121 U. S. 27, 30 L. Ed. 864;
United States v. *Knox*, 120 U. S. 422, 26 L. Ed. 216;
Kennedy v. *Gibson*, 8 Wall. (U. S.) 498, 19 L. Ed. 476;
Flash v. *Conn.*, 109 U. S. 371;
Tompkins v. *Craig*, 93 Fed. 885.
Broderick v. *American General Corp. et al.*, 71 F. (2d) 864.

Secondly, there is no common fund to be administered:

Bouton v. *Van Buren,* 229 N. Y. 17, *supra.*

Furthermore, under the Conformity Act (28 U. S. C. A. 724), the provisions of Ohio General Code, Sec. 11257, permitting one or more to sue or defend for the benefit of all when the question is one of a common or general interest of many persons, or the parties are very numerous, and it is impracticable to bring them all before the court, are applicable in the federal courts in an action at law.

That is to say, in the case at bar, any bondholder or other creditor could intervene in any action that might be brought at law on behalf of all creditors and upon proving his cause of action would receive a judgment for a proportion of the stockholders' liability to which he may be entitled.

This procedure is not the procedure of a class suit in equity, but is a statutory procedure which has been held by the Ohio courts to apply to actions at law.

Platt v. *Colvin,* 50 Ohio St. 702, 712, 713.

For a similar New York case, construing a similar New York statute (Sec. 195, N. Y. Civ. Pr. Act), see *Atkins* v. *Trowbridge,* 162 App. Div. 629.

The Federal courts have similarly construed similar statutes of other States.

Stearns Coal Co. v. *Van Winkle* (C. C. A. 6), 221 Fed. 590; cer. denied 241 U. S. 670;

Perry v. *Central Coal & Coke Co.* (C. C. A. 8), 138 Fed. 769;

Cherry v. *Howell,* 4 Fed. Supp. 597, 599, affirmed (C. C. A. 2), 66 F. (2d) 713.

From the foregoing it will be seen that there is not the slightest difficulty in ascertaining the fractional portion of the total stockholders' liability to which each creditor intervening in the action would be entitled. He can receive

as much in an action at law as he can possibly receive in an action in equity, and under these circumstances equity will not intervene because some bondholder or creditor may not see fit to intervene for the protection of his specific rights.

The legal remedy is, therefore, full and adequate and the mere fact that the plaintiffs choose to denominate their action a bill in equity when in fact it is a petition at law, cannot change the essential character of the petition.

4. There is no trust fund involved.

Assets of an insolvent corporation do not constitute a trust fund for the benefit of creditors for the purpose of creating equitable jurisdiction.

Hollins v. *Brierfield Coal & Iron Co.*, 150 U. S. 371, at 383;

Wood v. *Nat. City Bk.* (C. C. A. 2), 24 F. (2d) 661, at 662;

Jones v. *Mutual Fidelity Co.*, 123 Fed. 506.

It is also clear that stockholders' liability which has been expressly declared by the Supreme Court (*Wheeler* v. *Greene*, 280 U. S. 49) not to be an asset of the corporation, does not constitute a trust fund.

Broderick v. *American General Corp et al.* (C. C. A. 4), 71 F. (2d), 864.

The decree of the Chicago court, on which this action is based, provided in paragraph 12 (R. 39):

> "the court reserves jurisdiction as to all questions which may arise * * * concerning the application and distribution of moneys collected by the receiver herein and concerning the settlement of the account of the receiver, his discharge and the amount to be allowed the receiver and counsel for plaintiffs; and also concerning the compromise by the receiver herein of doubtful claims, or of claims against stockholders who are of doubtful solvency."

Thus the District Court, at Chicago, has first obtained jurisdiction over the *res, i. e.*, the trust fund, and has expressly reserved the right to administer and distribute additions to it. Under the respondents' theory there would be trust funds all over the country, each being administered separately *in violation of the very decree in Chicago which they procured.*

Plaintiffs in this *Ohio* case were plaintiffs in the *Chicago* case, and are bound by their decree ordering the District Court at Chicago to administer the fund which their action at Dayton seeks to collect from Ohio shareholders. The doctrine of comity prevents two courts from attempting to administer the same fund:

21 *C. J.* 41, 42.

The plaintiffs contend further that equitable jurisdiction is necessary because the distribution of the fund hoped to be obtained by judgment against these defendants requires it.

But, it has been held that a lawsuit brought for the purpose of creating a fund does not require the aid of equity in distributing the fund subsequently realized from judgments so to be obtained.

Bouton v. *Van Buren*, 299 N. Y. 17.

This is so because of the established practice, not only in Ohio but elsewhere, that a several judgment may be rendered in a law action so as to give to each plaintiff his proportionate part of the whole amount recovered.

Ohio General Code, Section 11583;

Ohio General Code, Section 11420-19;

United Mine Workers of America v. *Coronado Coal Co.* (C. C. A. 8), 258 Fed. 829, at 832-833; affirmed 259 U. S., 344, 383;

Kansas City Southern Ry. v. *Leslie*, 238 U. S. 599, 603;

Gulf, Colorado & Santa Fe Ry. Co. v. *McGinnis,* 228 U. S. 173, 176;

Walsh Construction Co. v. *Cleveland,* 16 Ohio L. R. 62, 66, 67 (N. Dist. of Ohio).

5. Multiplicity of suits alone is not sufficient basis for equity jurisdiction.

In the lower courts plaintiffs urged the avoidance of a multitude of suits as a justification for seeking the exercise of the equitable powers of the court through a bill in equity. It is axiomatic that a multitude of suits is no ground for equitable relief under these circumstances.

Hale v. *Allinson,* 102 Fed. 790, at 791 (affd. 188 U. S. 56);

Equitable Life Assurance Soc. v. *Brown,* 213 U. S. 25, 51;

Boise Artesian Water Co. v. *Boise City,* 213 U. S. 276, 286.

It is only when there is a multiplicity of actions between the same parties growing out of a single transaction or based upon a single contract in which there are to be a large number of separate recoveries between the same parties, that equity intervenes for the purpose of diminishing the number of actions.

In the recent case of *Matthews* v. *Rodgers,* 284 U. S. 521, at p. 530, the Supreme Court said:

> "In general, the jurisdiction of equity to avoid multiplicity of suits at law is restricted to cases where there would otherwise be some necessity for the maintenance of numerous suits *between the same parties, involving the same issues of law or fact.* It does not extend to cases where there are numerous parties plaintiff or defendant, and the issues between them and the adverse party *are not* necessarily identical." (Citing

authorities, including *Kelley* v. *Gill*, *Hale* v. *Allinson*, and Pomeroy Eq. Jur., 4th Ed., Secs. 251, 251½, 255, 259, 268.)

It is interesting to note that the court also held in the above case (p. 524) that want of equity jurisdiction by reason of the existence of an adequate remedy at law, if obvious, may and should be objected to by the court of its own motion.

As was pointed out in *Hale* v. *Allinson*, 188 U. S. 56, even the existence of a multiplicity of suits is not sufficient to sustain a bill in equity, in a case of this kind.

Said the court, at pages 77-80:

> "The single fact that a multiplicity of suits may be prevented by this assumption of jurisdiction is not in all cases enough to sustain it. It might be that the exercise of equitable jurisdiction on this ground, while preventing a formal multiplicity of suits, would nevertheless be attended with more and deeper inconvenience to the defendants than would be compensated for by the convenience of a single plaintiff.
>
> • • • 'If, as is sure to happen, differing defenses are put in by different defendants, the bill evidently becomes a single proceeding only in name. In reality it is a congeries of suits with little relation to each other, except that there is a common plaintiff, who has similar claims against many persons. But as each of these became liable, if at all, by reason of a contract entered into by himself alone with the making of which his co-defendants had nothing whatever to do, so he continues to be liable, if at all, because he himself, and not they, has done nothing to discharge the liability.'
>
> • • • We therefore must deny the jurisdiction of equity, so far as it is based upon the asserted prevention of a multiplicity of suits."

This case is a complete answer to the arguments advanced by the plaintiffs that an action in equity is neces-

sary to save a large number of actions against these defendants. See also:

Kelly v. *Gill*, 245 U. S. 117;
Broderick v. *American General Corp. et al.* (C. C. A. 4), 71 F. (2d) 864;
Carey v. *McMillan* (C. C. A. 8), 289 Fed. 380;
Fidelity Trust & Safe Dep. Co. v. *Archer* (C. C. A. 3), 179 Fed. 32;
Tompkins v. *Craig*, 93 Fed. 885;
Buchanan v. *Adkins* (C. C. A. 4), 175 Fed. 692, 701.

POINT D.

The Circuit Court of Appeals should have affirmed the decree of the District Court dismissing the bill of complaint, on the grounds that the bill did not state facts sufficient to show the required jurisdictional amount of in excess of three thousand dollars ($3,000.00), for the following reasons:

1. Many of the defendants own less than thirty-one (31) shares of stock, alleged in the bill of complaint to have a par value of one hundred dollars ($100.00).

Over one hundred of the defendant shareholders own less than thirty-one shares of the stock in question. Motions to dismiss were filed on behalf of some of these defendants on the grounds that as to them sufficient facts were not alleged in the bill of complaint to show the required jurisdictional amount in controversy. The liability of the defendants is individual and several. This is not only so by the terms of the statute (12 U. S. C. A., Sec. 812) which provides that each shareholder shall be liable "equally and ratably, and not one for another," and again by the terms of the Chicago decree upon which this suit is based, but also by reason of the fact that each defendant has the right to set up his own individual defense because of the fact that

his liability arises out of a separate and independent contract having no privity with any other contract. The stockholders' liability arises by virtue of his stock subscription agreement or his ownership of the stock in which contract the double liability provisions of Section 812, *supra*, form a part.

It is thus quite clear under any method of calculation that no shareholder who owns less than thirty-one (31) shares of the stock alleged to have a par value of $100 per share, can be sued in a Federal district court for his double liability. The District Court below was clearly right in dismissing the bill of complaint as to such defendants.

2. The defendants who own more than thirty (30) shares of stock each cannot be sued in this action for more than their proportionate liability to these complainants, which in every instance is less than $3,000.00, even when calculated on the basis of a par value of $100.00 per share.

It is the position of counsel for petitioners that neither the plaintiffs' claims nor defendants' liabilities may be aggregated to confer jurisdiction upon the Federal court. The fact that there are a large number of plaintiffs who own a large number of bonds and that they or some of them are seeking to recover in the Federal court from stockholders of the Chicago Joint Stock Land Bank the amount of their assessment, does not permit the amount of the bonds to be taken as the criterion of jurisdictional amount.

The jurisdiction is fixed by the amount of the several liabilities, separately and individually, and not by the amount of the total liabilities or the total claims. This is because the actions are several, the liabilities are several and the contracts are several. The plaintiffs are not suing for the amount of their bonds, but for the amount of the assessment against the stockholders severally.

No individual defendant, therefore, could be required to respond to a plaintiff for more than the amount claimable against him. It follows that the jurisdictional amount is fixed by the amount of each defendant's liability and not by the combined amount, either of the plaintiffs' claims or of the defendants' liabilities.

Chatfield v. *Boyle,* 105 U. S. 231;
Schwed v. *Smith,* 106 U. S. 188, 190;
Rogers v. *Henepin County,* 239 U. S. 621, at 622;
Scott v. *Frazier,* 253 U. S. 243, at 244;
Lion Bonding Co. v. *Karatz,* 262 U. S. 77, at 85;
Bullard v. *Cisco,* 290 U. S. 179;
Everhard v. *Northwestern Mut. Life Ins. Co.* (C. C. A. 6), 241 Fed. 353;
Cohn v. *City Service Co.* (C. C. A. 2), 45 F. (2d) 687, 689;
Aufdenkamp v. *L'Herrison,* 56 F. (2d) 344, 345;
Broderick v. *American General Corp.* (C. C. A. 4), 71 F. (2d) 864.

Plaintiffs allege they own $132,000 of bonds out of a total of more than $42,000,000 of bonds issued by the bank (R. 3-4).

The claims of the plaintiffs are separate and several, and for jurisdictional purposes cannot be aggregated; but, even when aggregated for the purpose of this argument, they are limited to $\frac{132,000}{42,000,000}$ part of the total liability of each defendant. Even if the amounts claimed from all defendants are aggregated (which we do not concede may be done), the above fractional part of the alleged total liability to these plaintiffs is only $1,422.59, which is computed on the basis of $\frac{132,000}{42,000,000}$ part of $458,900, the latter figure being the total amount of the attempted recovery from all

defendants herein in behalf of all creditors of the bank (R. 7-11).

Since it has been repeatedly held by the Federal courts that the amount in controversy is limited to the amount that any one plaintiff would be entitled to receive for himself, it necessarily follows that no single defendant is liable to any one plaintiff, for an amount in excess of three thousand dollars ($3,000.00). Even if both claims and liabilities be aggregated, as pointed out above, the jurisdictional amount is wahting.

Terry v. *Bank of Commerce*, 93 U. S. 44;
Chatfield v. *Boyle*, 105 U. S. 231;
Walter et al. v. *Northeastern R. R. Co.*, 147 U. S. 370;
Wheless v. *St. Louis*, 180 U. S. 379, at 382;
Title Guaranty & Surety Co. v. *State of Idaho, Etc.*, 240 U. S. 136;
Robbins v. *Western Auto Ins. Co.* (C. C. A. 7), 4 F. (2d) 249, certiorari denied 268 U. S. 698;
Pinkston v. *B. of L. F.* (C. C. A. 6), 69 F. (2d) 600, affirmed 293 U. S. 96;
Auer v. *Lombard* (C. C. A. 1), 72 Fed. 209;
Smithson v. *Hubbell*, 81 Fed. 593;
Risley v. *City of Utica et al.*, 168 Fed. 737, at 747;
Everhard v. *Northwestern Mut. Life Ins. Co.* (C. C. A. 6), 241 Fed. 353;
Elliott v. *Empire Natural Gas Co.* (C. C. A. 8), 4 F. (2d) 493;
Woods v. *Thompson* (C. C. A. 7), 14 F. (2d) 951;
First Nat. Bank of Woodbine et al. v. *Harrison Co., Iowa* (C. C. A. 8), 57 F. (2d) 56, at 57.

We call attention particularly to the fact that several of the cases cited above were suits in equity, where the claims of the plaintiffs were that a trust fund was involved, in which a number of claimants had interests, so that even

if the amended bill in this case could be held to state a good cause in equity, yet it was properly dismissed for lack of jurisdictional amount. This rule applies in equity as well as at law.

In the Circuit Court, plaintiffs relied upon *Brusselback et al.* v. *Cago Corporation et al.*, 85 F. (2d) 20, and *Robertson* v. *Conway*, 188 Fed. 579, as supporting their claim that the required jurisdictional amount is in controversy.

Each of those cases is distinguishable from the instant case. In the *Cago* case the jurisdictional amount was $\frac{132,000}{42,000,000}$ part of $1,189,600, which is $3,738.74; whereas in the case at bar the jurisdictional amount, on the same basis of calculation, is $\frac{132,000}{42,000,000}$ part of only $458,900, which is but $1,422.59. Our method of computation of the jurisdictional amount was not presented in the *Cago* case, probably for the obvious reason that the fund sought to be recovered ($1,189,600) would clearly bring the fractional part belonging to the plaintiffs to an amount in excess of $3,000, as above explained.

Robertson v. *Conway*, is not in point for at least two reasons.

First, the case was what we have heretofore called a "primary" suit, to take an accounting of all the assets and liabilities of the bank and to make and levy the assessment, and then, incidentally, to collect the assessment. This important feature is stated by the court on page 583 of 188 Fed., as follows:

> "Under the bill in question there were thus necessarily involved certain fundamental questions common to all stockholders, viz., the amount, if anything, by which the debts of the bank exceeded its assets, and the amount of the outstanding stock."

None of those facts is present in this Ohio litigation.

Second, the part of the fund which the complainants in the *Conway* case claimed for themselves exceeded the then jurisdictional amount of $2,000 (page 584). That is not true in the case at bar.

3. The par value of the shares of stock of the Bank is fixed by statute at five dollars ($5.00) per share.

The act known as the Federal Farm Loan Act, passed in 1916, to provide "capital for agricultural development, to create standard forms of investment based upon farm mortgage," etc., created both "Federal Land Banks" and "Joint Stock Land Banks". They were emanations, at the same time, of one general purpose. They had a number of features in common. Both were put under the administration of the Federal Farm Loan Board. Both were capable of being financial agents of the Government. Both were for carrying on the business of issuing and selling farm loan bonds and investing funds in farm first mortgages. The clauses of the act covering the organization of Federal Land Banks are embodied in Sections 671 to 697, inclusive, Title 12, U. S. C. A. Among them is Section 692, reading as follows:

> "The capital stock of each Federal land bank shall be divided into shares of $5 each, and may be subscribed for and held by any individual, firm, or corporation, or by the government of any state or of the United States."

The provisions of the act covering the organization of Joint Stock Land Banks are embodied in Sections 811 to 822, inclusive. Among them are Sections 811, 812, 813, and 815, as follows:

> SEC. 811. "• • • They shall be organized subject to the requirements and under the conditions set forth

in Sections 671-683 of this chapter, so far as the same may be applicable. * * *"

SEC. 812. "* * * Shareholders * * * shall be held individually responsible, equally and ratably, and not one for another, * * * to the extent of the amount of stock owned by them at the par value thereof, * * *"

SEC. 813. "Except as otherwise provided, joint-stock land banks shall have the powers of, and be subject to all the restrictions and conditions imposed on, Federal land banks by this chapter, so far as such restrictions and conditions are applicable: Provided, however, that the Government of the United States shall not purchase or subscribe for any of the capital stock of any such bank; and each shareholder of any such bank shall have the same voting privileges as holders of shares in national banking associations."

SEC. 815. "No joint stock land bank shall be authorized to do business until capital stock to the amount of at least $250,000 has been subscribed, one-half thereof paid in cash and the balance subject to call by the board of directors, and a charter has been issued to it by the Federal Farm Loan Board."

The above are practically all the provisions concerning stock of the Joint Stock Land Banks, until we come to Section 961, *et seq.*, covering insolvency and liquidation of banks and associations under said act, when the same clause covers both Federal Land Bank and Joint Stock Land Banks:

SEC. 963. "Upon default of any obligation, Federal land banks and joint stock land banks may be declared insolvent and placed in the hands of a receiver by the Federal Farm Loan Board, and proceedings shall thereupon be had in accordance with the provisions of this section regarding national farm loan associations."

It will be noticed that the act under subtitle "Capital Stock of Federal Land Banks" (Sections 691 to 697, in-

clusive) provides specifically for (1) minimum amount of capital before beginning business, (2) how times and conditions of payment of subscriptions may be prescribed, (3) division into $5 shares, (4) how they may be subscribed for and held, i. e., whether by individual, firm, or corporation, (5) transferability, (6) dividends, (7) voting of stock. But under the sub-title "Joint Stock Land Banks" (Sections 811, *et seq.*, above quoted) aside from the specific cross-reference to "powers", "restrictions and conditions" imposed on Federal Land Banks, no provision is specifically made thereunder for division into shares or par value of shares, or who may subscribe for and hold stock, transferability, dividends. Only on those points which differentiate Joint Stock Land Banks' powers, restrictions, and conditions from Federal Land Banks, is express provision made; thus (1) minimum amount of capital is changed from $750,000 to $250,000; (2) the Government of the United States is allowed to subscribe for and hold stock in Federal Land Banks but is forbidden to hold it in Joint Stock Land Banks; (3) instead of one vote per share if held by National Farm Loan Associations or by the Government, and non-voting by other shareholders, as in the case of Federal Farm Loan Banks, the shareholders in Joint Stock Land Banks have the same voting privileges as in national banks.

The conclusion from the premises is, that on all matters *not specifically differentiated*, Joint Stock Land Bank stock has the same *powers, restrictions and conditions* as Federal Land Bank stock. And among these matters *not specifically differentiated* is the matter of par value of stock. Since the Federal Land Bank stock is expressly required to be $5 per share, and no provision whatever is found for Joint Stock Land Bank stock other than in the general provision that these banks "shall have the powers of and be subject to all the restrictions and conditions imposed on, Federal land banks", the reasonable conclusion is that Con-

gress meant the shares of these banks also to be in denominations of $5 par. *Otherwise the statute would be entirely silent as to what stock a Joint Stock Land Bank might issue.*

This conclusion is strengthened by the fact that the stock of national farm loan associations, provided for in the same act, is also set at $5. (Sec. 731.)

It is further strengthened by the fact that subsequent legislation of 1923, providing for the creation of Federal Intermediate Credit Banks, to be subject also to the Federal Farm Loan Board in much the same way as Federal Land Banks and Joint Stock Land Banks, expressly fixed the capital stock of those banks at $5 per share (Title 12, Sec. 1061, U. S. C. A.)

No apparent reason exists why Joint Stock Land Bank shares should have been intended to be an exception to the general rule, and the law is settled that a corporation has no power to issue stock of a kind not expressly authorized by the statute under which it is created.

Our claim therefore is, that the par value of Joint Stock Land Bank shares having been fixed by statute at $5, the double liability created by Section 812 must be calculated on that basis, instead of $100.

This question seems to have engaged the attention of but one judge, viz., Patterson, District Judge, Southern District of New York, and in but one case: *Todd* v. *Russell,* 1 F. Supp. 788. His decision was adverse to what we here contend for, but was rendered we think upon insufficient consideration of the Federal Farm Loan Act and upon hasty conclusion. He says (page 789):

> "There is nothing in the Federal Farm Loan Act or in any other statute that expressly limits the par value of joint stock land banks to $5 a share. The defendant's contention is built upon 12 U. S. C. A., Sec. 692, to the effect that the par value of Federal Land Banks' shares shall be $5 each, and upon Sec. 813 to the effect that the joint stock land banks 'shall have the same power of, and

be subject to all the restrictions and conditions imposed on, Federal Land Banks by this chapter, so far as such restrictions and conditions are applicable.' But the latter section quite clearly refers to the general powers and restrictions on these banks and not to the internal structure of the two kinds of banks. Section 781 is entitled 'Powers of Federal Lank Banks Generally', and Section 791 is entitled 'Restrictions on Federal Land Banks'. These are the sections made operative generally to joint stock land banks, and neither of them deals with par value of stock. There is no limitation in the law on the par value of stock in joint stock land banks, and this defense is invalid."

The reasoning of the learned judge would be more convincing were it not the apparent fixed policy of Congress, in creating banks of any sort, to prescribe (and in law necessary that it prescribe) the par value of their stock. Thus, besides the Federal Land Banks, and Federal Intermediate Credits Banks above mentioned, the National Banks (Title 12, Sec. 287) have their shares fixed at $100 par value. Unless some good reason be apparent why an exception was intended in the case of Joint Stock Land Banks, these should be held to be governed by the plain meaning of the words of Section 813.

The language of said section: "shall have *the powers of* and be subject to *all the restrictions and conditions imposed on,* Federal Land Banks," cannot fairly be construed as referring only "to the *general* powers and restrictions on these banks and *not to the internal structure.*" If Congress had meant this language to refer only to Sections 781 as to powers generally and 791 as to restrictions, it could easily have said so. We have a right to assume it would have said so, had it not intended a broader scope.

A glance at the text of the two Sections 692 and 813 strengthens the view that Congress was considering the "internal structure" when using the language in question. In Section 813 it adds the proviso: "that the Government of

the United States shall not purchase or subscribe for any of the capital stock" of Joint Stock Land Banks. Now, in Section 692 of the clause fixing shares of land banks at $5 each, adds: "and may be subscribed for and held by • • • the government of any state or of the United States." Clearly, then, *it was this very Section 692, and a differentiation regarding that particular feature of it, that was under consideration in Section 813.*

Section 813 further provides that each shareholder in Joint Stock Land Banks shall have the same voting privileges as stockholders in national banks. But the voting privileges of stock in Federal Land Banks are provided for in Section 694, almost immediately following 692. Again, this is a matter of "internal structure", and a clear indication that Congress was considering 692 and its context with regard to capital stock, rather than those more remote sections preferred by District Judge Patterson.

It may be argued however that although the statute prescribed $5 as the par value, nevertheless the shares were issued in denominations of $100, and the subscribers are estopped from now claiming the statutory limitation, of which they are presumed to have had knowledge. To this it is a sufficient answer that the United States courts have consistently held the measure of powers of national banks to be their statutory grant, and powers not conferred by Congress are denied them.

See *Texas & Pac. Ry. Co.* v. *Pottorff*, 291 U. S. 245, affirming 63 F. (2d) 1.

In that case the U. S. Supreme Court held further:

> Syl. 6. "No rights arise on an ultra vires contract, even though contract has been performed, and such conclusion cannot be circumvented by erecting estoppel which would prevent challenging legality of power exercised."

See also:

Awotin v. *Atlas Exchange National Bank*, 295 U. S. 209;
California Bank v. *Kennedy*, 167 U. S. 362.

In this latter case a national bank had become a shareholder in a state savings bank. A creditor of the savings bank brought action in a California state court for a judgment against the savings bank for the amount of his deposit, and named as defendants also the national bank and others as stockholders, to collect their statutory liability under California law. The national bank set up its own want of authority to purchase stock in another corporation. The Supreme Court held this defense good as against an attempt to enforce the liability of a stockholder. Speaking through Justice White it said, page 366:

> "It is settled that the United States statutes relative to national banks constitute the measure of the authority of such corporations, and that they cannot rightfully exercise any powers, except those expressly granted or which are incidental to carrying on the business for which they are established. Logan County Bank v. Townsend, 139 U. S. 67, 73. * * * It is clear however that a national bank does not possess the power to deal in stocks. The prohibition is implied from the failure to grant the power. First National Bank v. National Exchange Bank, 92 U. S. 122, 128."

And further along the opinion quotes *Central Trans. Co.* v. *Pullman's Palace Car Co.*, 139 U. S. 24, 59 to 60, as follows:

> " 'A contract of a corporation, which is ultra vires, in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the Legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made

it, but that it could not make it. *The contract cannot be ratified by either party*, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it.'

"This language was also cited and expressly proved in Jacksonville, etc., Ry. *v.* Hooper, 160 U. S. 514, 524, 530." (Italics ours.)

Still further Justice White says (page 371):

"As was said by this court in Union Pacific Railway *v.* Chicago, etc., Railway, 163 U. S. 564 (speaking through Mr. Chief Justice Fuller) p. 581:

"'A contract made by a corporation beyond the scope of its powers, express or implied, on a proper construction of its charter, cannot be enforced, or rendered enforceable by the application of the doctrine of estoppel.'"

If the above principles, held good for national banks, are applicable to joint stock land banks, the Chicago Joint Stock Land Bank did not have the power to issue shares of its stock other than at a par value of $5, for no such power was expressly or by implication conferred upon it by the statutory law of its origin. There is no *implied power* in a corporation (which is a creature of a statute) to issue shares of stock of a kind not *expressly* authorized by that statute, *and any express authorization inserted in the charter purporting to give such authorization* is void:

Laredo Imp. Co. v. Stevenson (C. C. A. 8), 66 Fed. 633, at 635;

See also *Goodman* v. *Greathouse* (1923), 47 Nev. 198, holding that a corporation cannot issue stock both with and without par value where the statute does not expressly authorize it.

Any attempt by the bank to issue shares having a par value other than $5 per share was *ultra vires*. Being

beyond the powers conferred upon the corporation by Congress, it was wholly void in that respect at least. No performance on either side could give it validity "or be the foundation of any right of action upon it". It "cannot be enforced or rendered enforceable by the application of the doctrine of estoppel."

If neither the corporation nor the stockholder can give validity to such an *ultra vires* feature of the stock, it necessarily follows that a creditor cannot do so for the purpose of enforcing the statutory liability, and the Federal courts have so held:

> *Scoville* v. *Thayer,* 105 U. S. 143; *Winters* v. *Armstrong,* 37 Fed. 508; *Laredo Imp. Co.* v. *Stevenson* (C. C. A. 8), 66 Fed. 633.

In the case last cited the Circuit Court of Appeals, in holding *void* certain shares of stock issued without express statutory authorization (*although the charter had been amended so as to ostensibly authorize the shares in question*), said, on page 635:

> "Corporations created under statutory authority are the mere *creatures of the statute. Their powers are measured by the statute under which they have their existence.* Beyond the limits of the powers *there* granted, and those fairly incidental thereto, they can neither act nor agree to act. Corporations thus created have *no implied power* to change the amount of capital prescribed in their charters, and all *attempts* to do so, *not expressly authorized by the statutes* under which they exist, *are void.*" (Italics ours.)

In *Head and Amory* v. *Providence Ins. Co.,* 2 Cranch 127, the great Chief Justice said, at page 167:

> "Without ascribing to this body, which, in its corporate capacity, is the mere creature of the act to which it owes its existence, all the qualities and dis-

abilities annexed by the common law to ancient institutions of this sort, it may correctly be said to be *precisely what the incorporating act has made it, to derive all its powers from that act, and to be capable of exerting its faculties only in the manner which that act authorizes.*

"*To this source of its being, then, we must recur to ascertain its powers,* and to determine whether it can complete a contract by such communications as are in this record." (Italics ours.)

One necessary result of holding the par value limited to $5 is to disqualify, on a further ground, plaintiffs' action for lack of jurisdictional amount involved. A defendant would have to hold more than 600 shares to have a total liability, even to all creditors, for an amount in excess of $3,000. None of these defendants does so, except the Western Securities Company. Even if the plaintiffs' contention that the aggregate of these claims should be regarded as a trust fund (to be collected *in futuro*) be sustained, and jurisdiction be thus based upon the aggregate, still they represent but $132,000 of the $42,000,000 bonds, as we show elsewhere in this brief, and they are limited therefore to a 132,000/42,000,000 part of that aggregate, which is far below the jurisdictional amount. As for the Western Securities Company and its 759 shares, plaintiffs name in their bill and amendment to bill four individual defendants "and other persons unknown" as the true holders individually of said 759 shares; and unless one of them be the holder of more than ¾ of the 759 shares, none of them can be said to be individually within the jurisdictional amount required on the showing of the pleadings. It is well settled that the jurisdictional amount must be clearly alleged by the plaintiff. It cannot be a matter of conjecture:

Eberhard v. *Northwestern Mut. Life Ins. Co.* (C. C. A. 6), 241 Fed. 353.

Attention is called to the fact that this suit is to collect a statutory liability, not a subscription to stock. A statutory liability cannot be enlarged.

On this question of interpretation of statutory provisions fixing the par value of shares and consequently the extent of double liability, the Court is respectfully reminded that these shareholders are something else than mere profit seekers. The joint stock land bank legislation occurred in July, 1916, in connection with a nationwide appeal by the National Administration to the patriotism of citizens. These investments were advertised and urged by the Government itself as a means of rehabilitating the agricultural interest. It pledged the utmost care for the protection of such investors. It is, therefore, not becoming in the judiciary department of the same government to go beyond the express wording of these statutes in an effort to enlarge by implication the additional liability. The disaster in which investors find themselves from having yielded too patriotically and confidently to the appeal of government is sufficiently great. Rather would it be in the spirit of fairness and justice to hold the double liability down to the express language of the statutes themselves.

Point E.

The Circuit Court of Appeals should have affirmed the decree of the District Court dismissing the bill of complaint on the grounds that the bill on its face exhibits a misjoinder of defendants and a misjoinder of causes of action.

Multifariousness exists not only because the liabilities of all defendants are distinct and separate and based upon distinct and individual contracts, but also because wholly distinct claims are joined to the money demand which forms the principal relief sought. There are 145 separate debtors who are sued together in this action as defendants with no

excuse therefor save that they are all stockholders of the Chicago bank, although their contracts of stock ownership are several, independent and distinct. In a case of this nature, as is clearly pointed out by the Supreme Court in *Hale* v. *Allinson*, 188 U. S. 56, at 78, "each defendant's defence may, and in all probability will, depend upon totally different facts, upon distinct and particular contracts, made at different times, and in establishing a defence, even of like character, different witnesses would probably be required for each defendant, and no defendant has any interest with another". See also Mr. Justice Peckham's quotation from the opinion of Judge McPherson on pages 79-80 of the report. And, as stated by the Circuit Court of Appeals in *Fidelity Trust and Safe Dep. Co.* v. *Archer* (C. C. A. 3), 179 Fed. 32, at 36, such a suit as this "while single in form, is but a conglomeration of suits for legal demands, involving different issues and different proofs and resulting in saving, if any, but little expense".

There is, therefore, no legal reason why these defendants should be joined; it is clear that they are improperly joined. *Tompkins* v. *Craig*, 93 Fed. 885, at 886; and authorities cited above.

POINT F.

The Circuit Court of Appeals should have affirmed the decree of the District Court dismissing the bill of complaint, on the grounds that the bill on its face exhibits a defect of parties plaintiff.

The Chicago decree (R. 39) provides in paragraph 10 thereof:

> "That the receiver herein be and he hereby is authorized to collect from any or all of the stockholders of said bank the assessments * * * whether such stockholders be parties to this suit or not and whether

such stockholders be residents of Illinois or reside elsewhere: And upon payment in full of any such assessments to the receiver herein, such receiver is hereby authorized to give full discharge and acquittance to any stockholder thus making payment."

Some of the motions to dismiss were based in part on the ground that the receiver in the Chicago action, having thus been named and designated in the Chicago decree (in which the plaintiffs herein were also the plaintiffs therein) as the person to bring this action, these plaintiffs at least are bound by their own decree. These plaintiffs cannot rely on their own decree in part and repudiate it in part. They must accept the whole decree according to its terms so far as they themselves are concerned.

Matter of Swales, 60 App. Div., 599; affirmed 172 N. Y., 651;

Matter of Morrison, 52 Hun. 102, at 108; affirmed 117 N. Y., 638;

Starbuck v. *Starbuck,* 173 N. Y., 503.

The case of *Wheeler* v. *Greene* is to be distinguished from this case because here the plaintiffs to this action were also the plaintiffs in the Chicago action, in which former proceeding the Illinois District Court at the instance and request of these plaintiffs designated the receiver in that action as the person to enforce and collect the stockholders' double liability and thus these same plaintiffs are estopped from repudiating or impeaching their own decree.

Conclusion.

The bill of complaint in this case is fatally defective because of the absence of allegations showing the facts supporting the liability of the Ohio shareholders. The decree of the Chicago court has no extra-territorial effect and cannot be depended upon to establish the insolvency of the Bank,

the necessity for the assessment and the extent of the assessment in an action to collect the assessment from shareholders who were not served with process and did not appear in the Chicago court. These non-resident shareholders cannot be deprived of their right to defend these essential elements by the mere allegation that the same have already been conclusively established.

The bill of complaint is likewise defective as to those defendants who represent estates of deceased shareholders because of the omission of allegations as to compliance with the probate laws of the State of Ohio. These complaining creditors suing in equity to enforce a statutory liability are not exempted from the requirements prescribed by Ohio law.

If it be assumed, however, that the decree of the Chicago court is effective and binding on these Ohio shareholders and does establish the liability for the 100% assessment, the action to collect this assessment was not properly brought in equity. It is nothing more than a suit on a money judgment. As surely as the original suit must be in equity, against both bank and stockholders, to make an accounting of the assets of the Bank and to determine and assess the liability, just so surely must subsequent proceedings to collect the assessment be at law.

The gratuitous prayer for equitable relief cannot be made a basis for equity jurisdiction. The main relief sought is recovery of a money judgment. That determines the nature of the proceeding. This is not a true class suit because there is no common fund to be administered. No fund of any kind can exist until the plaintiffs shall have obtained and collected judgments against these 145 separate alleged debtors on their separate liabilities. Furthermore, there is no necessity for a class suit here. Equity cannot be invoked in Ohio simply by alleging that the plaintiffs are suing on behalf of all creditors; because the Ohio General Code gives that privilege to plaintiffs at law as well.

Nor is the plaintiffs' resort to equity any better justified on the grounds that they have a great number of claims against separate and different defendants, even though the claims grew out of purchases of stock of the same corporation; no more than any merchant might bring one suit in equity to collect all his merchandise accounts. The defendants' constitutional right of jury trial is not thus to be "whistled away" to suit the convenience of the plaintiffs.

The required jurisdictional amount is not in controversy, because the proportional part of these two plaintiffs in whatever they collect for the creditors from the Ohio shareholders cannot be figured to exceed the sum of $3,000. If $5.00 be the true par value of the stock, no individual defendant is subject to the jurisdiction of a Federal court.

For these reasons, petitioners pray the Court for an order reversing the decree of the Circuit Court of Appeals for the Sixth Circuit, and affirming the decree of dismissal entered by the District Court for the Southern District of Ohio, Western Division.

Respectfully submitted,

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Dated at Dayton, Ohio, this 27th day of October, 1937.

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APPENDIX.

Sections of Ohio General Code pertinent to the presentation of claims against decedents' estates.

"§ 10509-112. Presentation, allowance and rejection of claims.—Creditors shall present their claims, whether due or not due, to the executor or administrator within four months after the date of his appointment. Such executor or administrator shall allow or reject all claims, except contingent claims, within thirty days after their presentation. Any claim presented after the time herein provided shall not prevail as against bona fide purchasers or as against executor and administrators who have acted in good faith, or against a surviving spouse who has made the election to take under the will or at law, and, except as to negotiable instruments maturing subsequent to the expiration of such time, any such late claim shall not prevail as against bona fide distributees. (R. S. § 6109; 38 v. 146, § 99; S. & C. 584; 102 v. 200; 114 v. 320 § 1.)"

"§ 10509-133. Action on rejected claim barred, when.—When a claim against the estate of a deceased person has been presented to the executor or administrator, and has been rejected by him in whole or in part, but not referred to referees, or if a claim has been allowed by the executor or administrator in whole or in part and thereafter rejected or further reduced by the court, the claimant or person deriving title from him, must commence an action thereon within two months after receipt of actual notice of such rejection or reduction, if the debt or any part of it be then due, or within two months after some part of it becomes due, or be forever barred from maintaining an action thereon; except that, in the event of the death, resignation or removal of such executor or administrator, within such two months' period and before action is commenced thereon, the action may be commenced within two months after the appointment of a successor; and provided that no claimant shall be permitted to bring an independent action on his claim after it has been heard and decided on the merits on exceptions to the schedule of debts filed by him.

"For the purposes of this section the action of a claimant shall be deemed to have been commenced when the petition and præcipe for service of summons on the executor or administrator have been duly filed. (R. S. § 6097; 38 v. 146, § 90; S. & C. 582; 114 v. 320 (431); 116 v. 385 (400), § 1. Eff. Sept. 2, 1935.)"

"§ 10509-134. Reinstatement of barred claim.—Upon petition filed by a creditor or person deriving title from him, whose claim has not been presented within the time prescribed by law, the probate court, if after notice to all interested parties and hearing, it is of the opinion that justice and equity so require, and that the petitioner is not chargeable with culpable neglect in failing to present his claim within the time so prescribed, may permit petitioner to file his claim for allowance, but such allowance shall not affect any payment or distribution made before the filing of such claim, nor shall it prejudice the rights of creditors whose claims were filed within the time prescribed by law. (114 v. 320, § 1.)"

"11257. When the question is one of a common or general interest of many persons, or the parties are very numerous, and is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all. R. S. § 5008; 51 v. 57, § 37; S. & C. 957."

"11583. Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants. By the judgment, the court may determine the final rights of the parties on either side, as between themselves, and grant to the defendant any affirmative relief to which he is entitled. R. S. 5311; 51 v. 57, § 371; S. & C. 1048."

"11420-19. When by the verdict either party is entitled to recover money from the adverse party, the jury must assess the amount of the recovery in its verdict. 114 v. 193 (211)."